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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No._____

LOUIS EMERY ROGER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is set out in the index, infra, pp. 16-19.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1972. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

1. **Whether it was plain error under Rule 52 (b), F. R. Crim. P., when the trial court failed to give a cautionary instruction about the consideration of accomplice witness testimony where:**

   A. The Court instructed the jury on the inferences resulting from possession in one state of property recently stolen in another state when such possession was established only by accomplice testimony, and;

   B. The Court further instructed the jury that "witnesses are presumed to speak the truth."

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 52 (b), Federal Rules of Criminal Procedure, provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

18 United States Code, Section 2312, provides:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5000 or imprisoned not more than five years, or both."

Amendment V to the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty or property, without due process of law * * *"

Amendment VI to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *"

STATEMENT

Louis Emery Roger was convicted of knowingly causing a tractor to be transported in interstate commerce in violation of 18 U.S.C., Section 2312.

Hubert Lee Coe, an admitted heroin addict, and Ronald Lee Stewart, an ex-convict, each previously convicted of the same offense, testified for the government and Roger respectively.

Coe made a deal with Roger in August, 1969, to steal a tractor in exchange for twenty papers of heroin. (Record 13-17). The plan as finally evolved was for Coe to rent a tractor and steal it. (R. 22-23). He obtained a fake driver's license but lost it before the scheme bore fruit. (R. 22-23).

While Roger and Stewart waited nearby, Coe leased a trailer from the B & B Western Sales. He signed his real name to the rental agreement. The trailer was removed by Stewart's truck which bore the license plates previously stolen by Coe. (R. 25-29). The next step was the rental of a tractor from Hertz Heavy Equipment Rentals. This was also handled by Coe with money furnished by Roger and Stewart. Again Coe signed his own name to the rental agreement and loaded the rented tractor onto the leased trailer, connected to Stewart's truck. (R. 32-38). The truck was not heavy enough to haul the load. Coe parked beside a service station and called

Roger for assistance. (R. 39-41). Roger drove to the service station. Some time later Stewart, Bart Myklebust and Ben Brandt arrived in a wrecker. (R. 43, 50-51).

Stewart gave ten papers of heroin to Coe. The other ten papers were to be delivered after Coe took the stolen tractor to Louisiana. (R. 52). Coe had to split his heroin with Brandt for use of the wrecker to tow the trailer. (R. 52-53).

It was soon discovered that the wrecker was also too light to pull the trailer. The project was abandoned until the next morning. (R. 55-56). Then with money furnished by Stewart, Coe rented a truck that was big enough to haul the trailer. (R. 56, 59-60). Coe drove the unit to Lafayette, Louisiana. Roger and Stewart led the way in Roger's car. (R. 62). They stopped at a lounge near the city, where Coe was instructed to wait. Stewart drove the truck away, following Roger's car. (R. 66).

Stewart brought the truck back and told Coe they had been unable to get in touch with the person who wanted the tractor. He instructed Coe to return the truck to Houston. (R. 67-68).

Seven or eight days later Coe went to Stewart's house and picked up the other ten papers of heroin which he divided with Brandt. (R. 69).

Brandt's testimony corroborated that of Coe's about the events at the service station and the inability of the wrecker to tow the trailer. Roger was present in his car but took no active part in the proceedings. He was also present the next morning when Coe rented the truck. He left at the same time Coe and Stewart did. (R. 177-185).

Employees of B & B Western Sales and Hertz Heavy Equipment Rentals corroborated the rental of the trailer and tractor to Coe. (R. 192-193, 213-216, 220-223). The trailer was later brought back to Lafayette, Louisiana. It had been repainted and the wooden floor had been replaced with a metal one. (R. 192-193). Hertz employees picked the tractor up at Hub City. (R. 217, 223-224).

Leland Lynn, an FBI agent, located the tractor on the Romero Backhoe Service lot in Lafayette, Louisiana, on October 6, 1969. (R. 227).

Stewart and his lawyer, Ralph Chambers, testified that Coe became angry with Roger and Stewart when they surrendered him on a state bail bond made to secure his release on a heroin possession charge. Coe said he would get even with them if it was the last thing he did. (R. 255-256, 297-299).

According to Stewart, he and Roger, partners in a roofing company, were at the office making out the payroll on August 15, 1969, during the time Coe was renting the trailer and tractor. Coe was employed by them as a roofer. He had borrowed Stewart's truck that day because he had no transportation of his own.

That evening Coe telephoned Stewart for help. He had rented a tractor to do some work with and it was broken down at a service station about four blocks from Stewart's house. (R. 246). Stewart and Roger drove to the service station. Stewart's truck was attached to a trailer which held a large tractor. Stewart became angry with Coe for using the truck to pull this heavy equipment. He made Coe disconnect the truck. Then Ben Brandt and Bart Myklebust arrived in a wrecker. The wrecker was con-

nected to the trailer. Coe asked Stewart if he would follow him and give him a ride home. They followed the wrecker to Brandt's garage where Stewart picked up Coe and drove him home. Roger stayed in the car at the service station. He rode in the truck with Stewart to the garage and accompanied him when he took Coe home. They returned and picked up the car at the service station.

The next morning Coe telephoned Stewart and asked if he could get a truck that would haul the tractor. Stewart and Roger took Coe to the garage and left him after Stewart advanced him forty-five dollars on his salary. Coe told Stewart that he had rented the tractor from Hertz and was "taking it up the country." (R. 245-253).

Roger did not testify.

The trial court instructed the jury:

> "Members of the Jury, you will recall earlier that I told you the defendant had a Constitutional right not to take the stand, and the Government has to prove every element of the case beyond a reasonable doubt, so this is rather technical in connection with stolen properties and I will request that you listen very carefully to this part. Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance on which the jury may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. And possession in one state of property recently in another state, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession not only knew this to be stolen

property but also transported it, or caused it to be transported in interstate commerce. Ordinarily, the same inference might be drawn from a false explanation of possession of recently stolen property. The term "recently" is a relative term and has no fixed meaning. Whether the property may be considered as recently stolen depends on the nature of the property and all the facts and circumstances shown by the evidence. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. If you should find beyond a reasonable doubt from the evidence in this case that the Ford tractor in question, described in the indictment, was stolen, and that while recently stolen the property was in possession of the accused in another state than that in which it was stolen, you may, from those facts, draw the inference that the tractor was transported, or caused to be transported in interstate commerce by the accused, with knowledge that it was stolen, unless possession of the recently stolen property by the accused in such state is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case. In considering if the possession of recently stolen property has been satisfactorily explained, again I remind you that in the exercise of his Constitutional rights, the accused may not take the witness stand and testify. There may be opportunities to explain possession by showing other facts and circumstances independent of the testimony of the defendant. You will always bear in mind that the law never imposes upon a defendant, as I said before, in a criminal case the burden or duty of calling any witnesses or producing any evidence. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession

of recently stolen property. Any possession the accused may have had of recently stolen property is consistent with innocence, or if you have a reasonable doubt of guilt, you must acquit the defendant."
* * *

Further, the Court informed the jury that:

"Witnesses are presumed to speak the truth, but this presumption may be overcome as to the testimony of any witness, or any part thereof, by the evidence in the case and all reasonable inferences drawn therefrom. In determining the credit you should give to a witness, and the weight and value you should attach to his or her testimony, you may take into consideration the conduct and appearance of the witness on the stand, the interest of the witness, if any, in the result of the trial, the motive actuating the witness in testifying, the witness's relationship to, or feelings for or against the defendant, the probability or improbability of the witness's statements, the opportunity the witness had to observe or to be informed as to matters respecting which such witness gives testimony. And, very important, your appraisal of the inclination of the witness to speak truthfully, or otherwise, as to the matters within the knowledge of such witness. All of these matters being taken into account together with all the other facts and circumstances shown by the evidence, it is your province to give the testimony of each witness just such credibility, weight, and significance as you may deem proper. In finding the facts, you are not bound to find according to the greater number of witnesses who may testify one way or another as to any particular facts, or either side of the case. It is your appraisal of the credibility, weight and probitive value of the testimony, regardless of the number of witnesses, which must be controlling in your determination of the facts. The testimony of a witness may

be discredited, or impeached, by showing that the witness has been convicted of a felony, that is, of a crime punishment by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is a province of the jury to determine the weight to be given to any prior conviction, or an impeachment." (R. 348-350).

REASONS FOR GRANTING THE WRIT

1. The testimony of an accomplice should be received with caution and weighed with care. It does not require corroboration and it is entitled to whatever credibility the trier of facts may think it deserves.

The federal courts uniformly hold that a refusal to give a cautionary instruction about accomplice testimony is not reversible error. *Lyles v. United States,* 5 Cir. 1957, 249 F.2d 744; *Diggs v. United States,* 9 Cir. 1916, 220 F. 545, affirmed 242 U.S. 470, 1917. Many of the cases, however, turn upon the impropriety of coupling the instruction with one requiring corroboration of the accomplice's testimony. Compare *Lyles v. United States,* supra.

The issue is broader here and reaches the integrity of the fact finding process itself.

First, the court advised the jury that Roger's possession in Louisiana of property recently stolen in Texas, if not satisfactorily explained, raised an inference that he knew the property had been stolen. Second, the court told the jury that "witnesses are presumed to tell the truth". Third, the court did not admonish the jury that an accused need not testify and that no inference of guilt could be drawn from his failure to do so.

The only evidence that Roger possessed the tractor in Louisiana was Coe's testimony. This evidence was weakened not only by the fact that Coe was an accomplice but also by the failure of the government to connect Roger with the Romero Backhoe Service where FBI agent Lynn found the tractor. No one from Romero testified. The government's failure to produce any evidence on this point raises a countervailing inference that Roger had no connection with Romero's possession of the tractor in Louisiana. See, generally, *Barfield v. United States*, 5 Cir. 1956, 229 F.2d 936; *Fitzpatrick v. United States*, 5 Cir. 1969, 410 F.2d 513; *Guevara v. United States*, 5 Cir. 1957, 242 F.2d 745; *Paige v. United States*, 5 Cir. 1968, 394 F.2d 105; *Montoya v. United States*, 5 Cir. 1968, 402 F.2d 847.

There was no evidence connecting Roger with the theft of the trailer and tractor, other than Coe's testimony. There was no evidence that Roger knew the tractor had been stolen, other than Coe's testimony. The government's whole case hinged upon the accomplice's testimony. Roger's conviction depended almost wholly upon Coe's credibility.

When the court failed to inform the jury that Coe's testimony should be received cautiously; affirmatively charged that every witness is presumed to speak the truth; did not instruct the jury that no inference of guilt should be drawn against Roger because of his failure to testify; and charged on the inference permissible from possession, where possession itself depended upon Coe's testimony, the error was so substantial that it reached constitutional dimensions, denying Roger due process of law and trial by an impartial jury. Cf., *United States v. Dunmore*, 8 Cir. 1971, 446 F.2d 1214.

Further, as the Court said in *Fitzpatrick v. United States*, 5 Cir. 1969, 410 F.2d 513, 515:

> "Because unexplained possession of a recently stolen vehicle permits substantial inferences which may help prove two essential elements of the Government's case, the evidence relied on as proof of possession must be scrutinized with care to prevent injustice. * * * (A) mere suspicion of possession will not support the inferences of transportation and guilty knowledge."

Thus the inference from possession, under the circumstances of this case, substantially reduced the government's burden of producing evidence and burden of proof. At the same time it substantially reduced Roger's presumption of innocence. The jury was authorized to presume that Coe spoke the truth. From this presumption the jury could infer that Roger possessed the tractor in Louisiana, ergo he knew that it had been stolen. See *Orser v. United States*, 5 Cir. 1970, 362 F.2d 580, 581, fn. 1.

Even though Roger made no objection to the Court's charge, the error was substantial and under Rule 52(b), F.R. Crim. P., his conviction should be reversed.

There is a growing tendency for the lower federal courts to hold, arbitrarily and without any real consideration of the underlying facts, that no substantial error is presented where the trial court fails or refuses to instruct the jury that accomplice testimony is highly suspect and should be viewed with caution. This Court should enunciate more definitive guidelines, particularly in cases where the error reduces the government's burden of proof, deprives an accused of a fair trial by an impartial jury, and denies

him due process of law. Roger has such a case. See *Holmgren v. United States*, 1910, 217 U.S. 509.

PRAYER

Petitioner Roger prays that the Court grant a writ of certiorari, set aside his conviction and sentence and order a new trial of this cause.

Respectfully submitted,

WILLIAM E. GRAY
Lawyer for Petitioner
412 Main, Suite 1210
Houston, Texas 77002
(713) 224-5436

CERTIFICATION

This will certify that a copy of the above and foregoing brief was duly mailed, postage prepaid, to the Honorable Donald E. Walter, United States Attorney, Attention L. Edwin Greer, Assistant United States Attorney, P. O. Box 33, Shreveport, Louisiana 71102, this the 13th day of September, 1972.

WILLIAM E. GRAY

APPENDIX

United States Court of Appeals
FIFTH CIRCUIT

OFFICE OF THE CLERK

August 30, 1972

EDWARD W. WADSWORTH
Clerk

Room 508-400 Royal St.
New Orleans, La. 70130

Mr. Will Gray
Attorney at Law
412 Main, Suite 1210
Houston, Texas 77002

No. 72-1011—U.S.A. v. Louis Emery Roger

MANDATE STAYED TO: September 17, 1972
(See Order Enclosed)

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion and judgment which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By SUSAN LeBRUN,
Deputy Clerk

enc.

cc and copy of order:
Mr. L. Edwin Greer

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 72-1011

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOUIS EMERY ROGER,
Defendant-Appellant.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be, and the same is stayed to and including September 17, 1972, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

JOHN MINOR WISDOM
United States Circuit Judge

Dated: August 30, 1972.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 72-1011
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
LOUIS EMERY ROGER,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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(August 18, 1972)

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

PER CURIAM: The appellant Louis Emery Roger was convicted of knowingly causing to be transported in interstate commerce a stolen tractor in violation of the Dyer Act, 18 U.S.C. § 2312. We affirm the judgment.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

On this appeal Roger asks us to hold, first of all, that the district court erred in failing to give the jury a cautionary instruction with respect to the testimony of his accomplice Hubert Cole. Roger made no request at his trial for such an instruction, nor did he object to the instructions which the court gave. He must therefore overcome the heavy burden of showing that the district court committed plain error. Fed. R. Crim. P. 52(b). In similar cases we have found no plain error where the accomplice's testimony was corroborated. *Dewitt v. United States,* 5 Cir. 1967, 383 F.2d 542; *Dunn v. United States,* 5 Cir. 1963, 318 F.2d 89; *Phelps v. United States,* 5 Cir. 1958, 252 F.2d 49; *Joseph v. United States,* 5 Cir. 1960, 286 F.2d 468. The record shows that Cole's account of his own actions was corroborated by the testimony of Roger's witness Stewart. Another witness, Brandt, supported Cole's account of events at Brandt's garage, where Cole and Roger were attempting to pull the tractor with a truck. The plain error rule, we have said, is "to be invoked only in exceptional circumstances to avoid a miscarriage of justice." *Eaton v. United States,* 5 Cir. 1968, 398 F.2d 485, 486 cert. denied, 1968, 393 U.S. 397, 89 S.Ct. 299, 21 L.Ed.2d 273. Cole's testimony, uncorroborated, would have been sufficient to sustain Roger's conviction. *Williamson v. United States,* 5 Cir. 1966, 365 F.2d 12. Given that it was corroborated, we cannot say that its admission without a cautionary instruction was so plainly unjust as to warrant reversal under Rule 52(b).

Roger also objects to the district court's refusal to admit an earlier tape-recorded statement, in which Cole exculpated him, for the purpose of impeaching Cole's testimony. Cole had, however, freely admitted making the

statement both on direct and cross-examination, but said that he had made it because of threats from Roger. Admission of the statement would have served no purpose, since it would not have contradicted Cole's testimony. District court judges have broad discretion with respect to the admissibility of evidence, *Cotton v. United States*, 8 Cir. 1966, 361 F.2d 673, 676. In the circumstances of this case we cannot say that the district court judge abused his discretion by refusing to admit this statement.

Roger raises numerous other contentions on this appeal: that the district court was biased, that the court allowed the government unwarranted scope in cross-examining Roger's witness Stewart, that the court erred in denying a motion for mistrial after Cole inadvertently quoted an allusion of Roger's to his having been in prison, and that the court erred in failing to instruct the jury that no inference of guilt or innocence should be drawn from Roger's failure to testify. Upon examination of the record we find these contentions to be without merit.

The judgment of the district court is AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 72-1011 Summary Calendar

D. C. Docket No. 19,848

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

versus

LOUIS EMERY ROGER, *Defendant-Appellant.*

Appeal from the United States District Court for the Western District of Louisiana

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 18, 1972

Issued as Mandate: